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United States Supreme Court

OCTOBER TERM, 1948

GERHARD EISLER,
Petitioner,
against
UNITED STATES OF AMERICA.
No. 255

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AS *AMICUS CURIAE*

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

ARTHUR GARFIELD HAYS,
Counsel.

OSMOND K. FRAENKEL,
EMANUEL GORDON,
of the New York Bar,
of Counsel.

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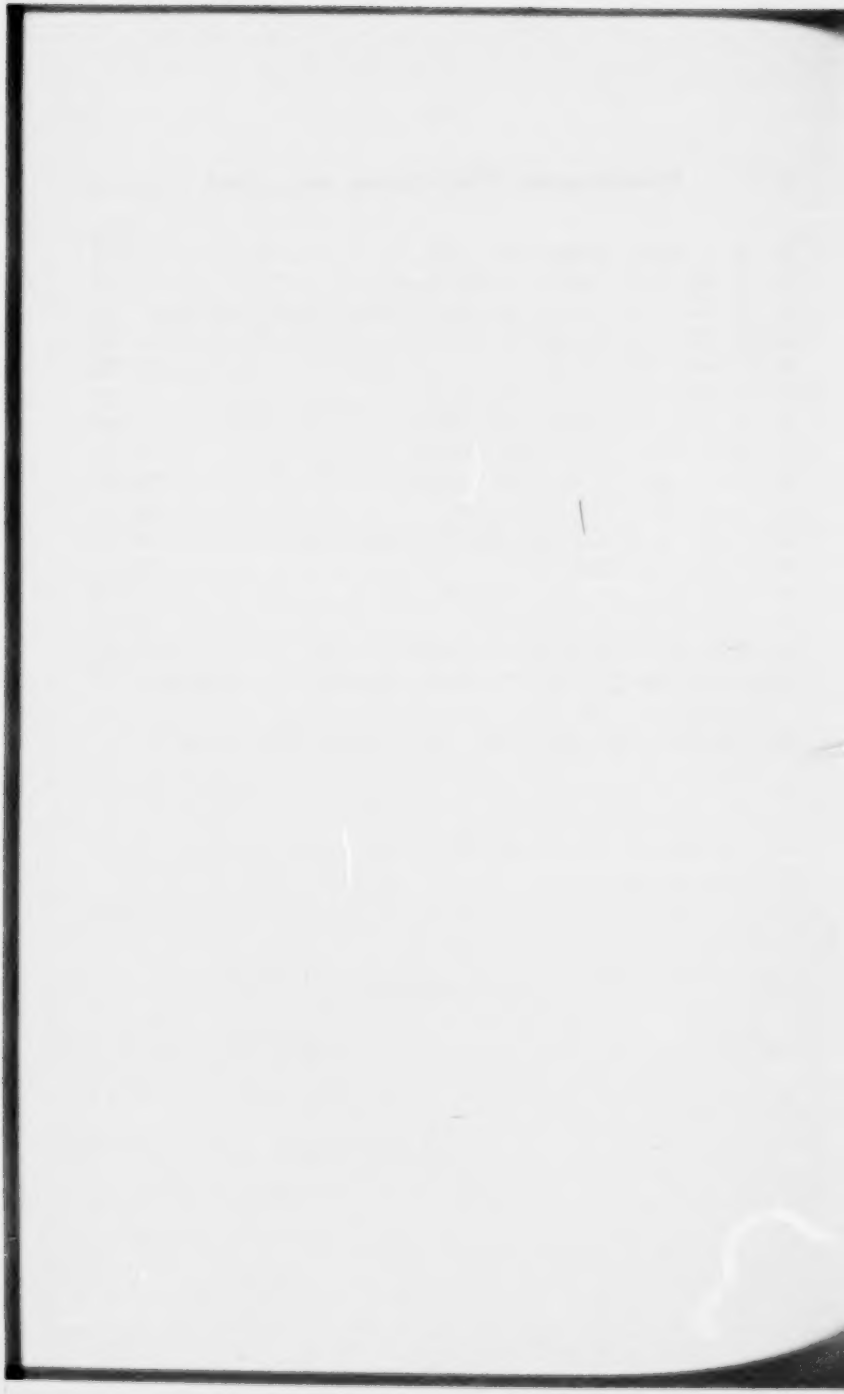

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AS *AMICUS CURIAE*

The Interest of the American Civil Liberties Union

The American Civil Liberties Union is an organization devoted to the protection and expansion of the guarantees contained in the Bill of Rights. Because this proceeding involves a member of the Communist Party, we believe that it is pertinent to state our views regarding the Communist Party. The American Civil Liberties Union as a champion of civil liberties is opposed to any governmental or economic system which denies fundamental civil liberties and human rights. It is therefore opposed to any form of the police state or to any single party state and any movement in support of them, whether fascist, Communist, or known by any other name. In opposing these dictatorial or totalitarian systems, the Union takes

no position on their economic, social, or political practices or policies not affecting civil liberties.

From the inception of the House Committee on Un-American Activities, the American Civil Liberties Union has consistently opposed it both because its very existence in our view constitutes a threat to freedom of expression and association by the nature of its mandate, and also because its procedure has been so arbitrary and guided largely by personal whim and political prejudice.

We take the opportunity to file this brief because the case at bar presents for the first time for decision the issue of whether the exercise of the powers said to have been conferred upon the Committee is consistent with the Constitution. This is the only question with which this brief is concerned.

Statement

Petitioner was indicted for violating 2 U.S.C. §192 (1946) in that, having been summoned to testify before the Committee on Un-American Activities of the House of Representatives (hereinafter called the "Committee") created pursuant to Public Law 601, §121, 79th Congress, and House Resolution 5 of the House of Representatives, 80th Congress, upon matters of inquiry committed to said Committee, he wilfully defaulted in that he refused to be sworn when so directed (R. 214-215). Petitioner was found guilty, and sentenced to imprisonment for one year and fined one thousand dollars (R. 229). The Court of Appeals for the District of Columbia sustained the conviction (R. 233), Judge Prettyman, dissenting (R. 241). A petition for a writ of certiorari was granted November 8, 1948 (R. 253).

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The Facts

Petitioner, a political refugee, came to this country in June, 1941 as an alien in transit to Mexico (R. 95, 114). He offered to prove that he was admitted to the United States on August 6, 1941 (R. 114), that he never applied for, nor received, a change in status (R. 95). Petitioner made repeated efforts to leave this country (R. 116), and offered to prove that his numerous applications were denied (R. 97). He was a national of Austria, and had never registered as an enemy alien (R. 87, 117).

A process server for the Committee telephoned petitioner at his home on January 24, 1947 and informed him that he had a subpoena to serve on petitioner for the Committee requiring petitioner's presence on February 6, 1947; petitioner arranged to await the process server at his home and to accept service (R. 24, 120). Thereafter, petitioner arranged for his appearance before the Committee by preparing a written statement to be read after he was sworn (R. 111, 122, 131, 139), consulting counsel (R. 122), purchasing railroad tickets to Washington (R. 111, 122), and reserved hotel rooms in Washington (R. 122).

Thereafter, petitioner was arrested on a presidential warrant as an enemy alien by two Security Officers under Presidential Proclamation 2526, dated December 8, 1941 as "dangerous to public peace and safety of the public peace" (R. 82, 89, 91, 123).

It is petitioner's claim that his arrest was solely to effectuate his appearance before the Committee (R. 89, 100, 213).

At the hearing petitioner offered to prove that the Committee brought him before it to harass and punish him for

his political beliefs and not to interrogate him upon any matter relevant to the inquiry committed to the Committee by Congress (R. 101-102, 119, 134, 135). The proffer was rejected. He also offered to prove that the Committee practice was to permit counsel to confer with his client but not to permit the attorney to speak (R. 107).

When called upon to be sworn, petitioner stated that he desired to make a three minute statement before taking the oath (R. 43-45). The transcript of the record before the Committee reveals that petitioner said at first "I am not going to take the stand" (R. 43). However he claimed that he was interrupted and intended to complete the statement by adding "before I make a few remarks" (R. 129). Although the claim of interruption was disputed by the Committee's investigator (R. 151), the latter failed to indicate how he could determine whether petitioner had completed his answer. At any rate, within the succeeding few seconds, petitioner stated no less than five times that he would take the oath upon making his three minute statement (R. 43-47).

Petitioner offered to prove that he was advised by counsel to make his objections to being sworn before he took the oath (R. 149-150). The Chairman of the Committee testified that this was the proper procedure (R. 49). Petitioner had made some notes on his alleged illegal arrest and the improper action of the Committee (R. 112, 127). He had these notes in his hand and intended to use them to object to the legality of his being sworn (R. 137-138). Petitioner offered to prove that his objections to the legality of his being sworn were based upon his unlawful arrest, detention and transportation to Washington for a purpose not within the scope of the inquiry which the Committee was authorized to conduct, that he had

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insufficient opportunity to consult counsel and desired an adjournment to do so, and that the Committee had subpoenaed petitioner to harass and punish him for his political beliefs and to prevent his departure from this country (R. 73, 134-135).

The Chairman of the Committee did not know what petitioner was going to state in his three minute statement and did not inquire (R. 50). Petitioner intended only to state his objections to being sworn (R. 133), and offered to prove the content of his objections for the purpose of proving his intent to be sworn and to testify after stating his objections (R. 72, 133, 135).

The Issue

The sole issue with which this brief is concerned is the constitutionality of the mandate of the House Committee on Un-American Activities. It is our contention that the broad powers given to the Committee to inquire into opinions, beliefs, and associations are precisely those the framers of the Constitution intended to prohibit by the First Amendment. Furthermore, the terms of reference are so vague and meaningless as to require condemnation on those general principles which have heretofore compelled the courts to strike down dragnet statutes.

POINT I

The First Amendment prohibits Congress from compelling revelation of opinions whose expression it may not restrain.

Before reaching the discussion of the attack upon the mandate of the Committee on its face, we wish to note that we are not raising the question of the standing of the petitioner to raise this issue, nor whether the petitioner was called to punish and harass him for his political beliefs. It is our view that the existence of the power to inquire into opinions gives standing to challenge the Committee by anyone called before it.

A. Freedom to be silent.

The freedom of speech protected by the First Amendment is more than an abstract right to speak how and when the spirit moves. It is a function of the philosophy which knows no absolute standard for what is right and wrong, and which relies in the search for wisdom upon the ability of an idea to obtain acceptance after competition with others in the marketplace of public opinion. (Holmes, J., dissenting in *Abrams* v. *United States*, 250 U. S. 616, 630-631 (1919)). The First Amendment therefore establishes procedural rules consistent with this philosophy for the moulding of public opinion and of legislation itself. Those rules protect expressions of opinion on matters of public concern from governmental interference in the absence of an immediate likelihood that these expressions will themselves produce serious substantive evils.

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The compulsory enunciation of orthodox views is proscribed as a complete negation of free speech, which is a mechanism for obtaining the expression and comparison of conflicting opinions. *West Virginia State Bd. of Education* v. *Barnette*, 319 U. S. 624 (1943). Not only previous censorship, but subsequent punishment is prohibited, where the speech in question relates to matters of public concern, for punishment and the threat of punishment operate to restrain the free expression of views. By the same principles, the revelation under governmental compulsion of opinions and ideas concerning public policies violates the First Amendment.

Much wisdom has emanated from brave leaders, but the world's wisdom and the nation's progress owe something to the timid too. Where public matters are in issue, the transitory majority provides no insurance of ultimate truth, and final acceptance has often been achieved by ideas hesitantly advanced, initially ridiculed or even brutally suppressed. The world of ideas would be impoverished indeed if dissenters could not limit their voices to their immediate circle of friends, their own organization or whatever group they select for audience; if the unpopular could be required to account publicly for their private views, or to express themselves before a wider and hostile audience. For these reasons, forced confession burdens and restrains freedom of expression, and the free circulation of ideas.

The rights protected by the First Amendment run against the Federal Government and all of its organs. A Committee of the Congress is a governmental body, its action is that of the government, and its activity is subject to the limitations of the First Amendment as is that of any other Federal body. Cf. *West Virginia State Board of Education* v. *Barnette, supra.*

B. The resolution establishing the Committee must be tested on its face.

There are no doubt certain limited areas within which the Federal Government may constitutionally restrain speech falling within the scope of the First Amendment. Congress may not, however, enact legislation which includes, but goes beyond, the constitutionally permissible restraints. And when Congress has done so, by statute, a party affected thereby may challenge the statute on its face, and is not required to demonstrate that Congress could not, by a statute more narrowly drawn, impose the same restraint complained of in the particular circumstances of his case. *Thornhill* v. *Alabama*, 310 U. S. 88, 97, 105 (1940); *Carlson* v. *California*, 310 U. S. 106, 111 (1940); *Schneider* v. *New Jersey*, 308 U. S. 147, 163-165 (1939); *Hague* v. *C.I.O.*, 307 U. S. 496, 516 (1939); *Lowell* v. *Griffin*, 303 U. S. 444, 450 (1938); *Herndon* v. *Lowry*, 301 U. S. 263 (1937); *Stromberg* v. *California*, 283 U. S. 359 (1931). The reasons of policy which operate to free persons complaining of the violation of their rights under the First Amendment from the procedural limitations of their own cases are as applicable to the Resolution constituting the Committee as in any of the cases in which the doctrine has been enunciated and applied.

The reasoning of the cases just cited derives from the fact that restrictive legislation, carrying criminal penalties, has a power to coerce compliance by its very presence on the books. Legislation purporting to restrict speech which cannot constitutionally be restrained may be an efficient muffler, though unconstitutional. It is a function of our natural desire to be let alone that not all of us are anxious or willing to be test cases. Unless statutes

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imposing excessive restraints are declared invalid irrespective of their application in particular cases, the legislature has little reason to limit restraining laws to constitutionally permissible perimeters.

Of course, testing a statute on its face merely means that its constitutionality must be determined by its possible applications and not necessarily its application to the facts of the case in which the constitutional issue is raised. The statute must still be interpreted, and it is the wording of the statute as interpreted by the Court which is tested on its face. *Chaplinsky* v. *New Hampshire,* 315 U. S. 568. In the case of a Federal statute, the United States Supreme Court not only makes the final determination as to constitutionality, but also as to interpretation. And the Court has strained to interpret Federal statutes so as to render them constitutional to the extent of disregarding statements on the floor of the Senate made by the Committee Chairman who was in charge of the bill and a co-author of it, *United States* v. *C.I.O.,* 68 S. Ct. 1349, although such extrinsic aids are deemed to constitute authoritative guides to Congressional intent when a constitutional issue is not involved. *Riggs* v. *Del Drago,* 317 U. S. 95; *American Chicle Co.* v. *United States,* 316 U. S. 450.

The authoritativeness of such extrinsic aids as statements by the Chairman of the Committee reporting a bill and by the person in charge of a bill on the floor rest upon the assumed reliance by members of Congress upon those statements in voting upon the bill. No doubt, a certain amount of fiction and convention enters into that assumption, but it appears to be a reasonable one, and one better calculated to arrive at the intent of the individual members of the legislature who voted for the bill

than the subjective predilections of the judges interpreting it without such an aid. When a constitutional issue is raised, however, comity between the branches of government has led the Court to prefer the fiction that Congress intended the statute to be constitutional to the semi-fiction that the members of Congress relied upon the explanation of the Committee Chairman and floor leader.

But how far can this Court carry such fictions as the former in the interests of comity? In the instant case the House Resolution authorizing the inquiry did so in broad, undefined terms which permitted the Committee to roam at will in the field of social, religious and political beliefs, and the Committee did so. The Committee's abuses did not go unnoticed, but, on the contrary, were subjected to wide public debate, to scholarly inquiry and to many debates on the floor of Congress during the course of reenactment of the Resolutions. Yet, the resolutions were reenacted without change. That Congress actually approved the Committee's interpretation as evidenced by its conduct is not a fiction. It is the reality which arises from years of struggle, and it cannot be tossed aside as a fiction in favor of a more compelling fiction. The Resolution and its history will now be detailed briefly.

The Special Committee on Un-American Activities (hereinafter referred to as the "Committee") was established by House Resolution 282, 75th Cong., 83 Cong. Rec. 7568* for the purpose of conducting an investigation of

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* This Resolution has been re-enacted without change as H.R. 26, 76th Cong., 1st Sess., 84 Cong. Rec. 1098, 1128 (1939); H.R. 321, 76th Cong., 3rd Sess., 86 Cong. Rec. 572, 605 (1940); H.R. 90, 77th Cong., 1st Sess.; 87 Cong. Rec. 886, 899 (1941); H.R. 420, 77th Cong. 2nd Sess., 88 Cong. Rec. 2282, 2297 (1942); H.R. 65, 78th Cong. 1st Sess., 89 Cong. 1st Sess., 91 Cong. Rec. 10, 15 (1945). These are hereinafter referred to as the "Resolution".

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> "(1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution."

A refusal to answer any question or produce any paper relevant to the inquiry is rendered a criminal offense by the statute under which the petitioner was convicted. See *Kraus & Bros.* v. *United States*, 327 U. S. 614 (1946).

In the course of debate on re-enactment, the Committee's investigation was criticized as having been excessively broad, and attempts were made to limit the breadth of the resolution.* The re-enactments without change must therefore be deemed to constitute an approval of, and ratification by, the Congress of the Committee's interpretation of the permissible scope of its investigations. *Douglas* v. *Comm'r*, 322 U. S. 275 (1944). The Committee's work has already been subject to scholarly scrutiny, and it suffices to quote from one of these studies to obtain light on the scope of the investigation authorized:

> "The work of the Committee, in its nine years of existence, offers very little indication that the Committee itself had any clear idea about the scope of its authority. Its reports have commented on the meaning of 'Americanism', but the meanings suggested have varied greatly, and they were never put forth as standards controlling its inquiries. The

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* 83 Cong. Rec. 7567-7686 (1938); 84 Cong. Rec. 1098-1128 (1939); 86 Cong. Rec. 572-605 (1940); 87 Cong. Rec. 886-900 (1941); 88 Cong. Rec. 2282-2297 (1942); 89 Cong. Rec. 721-730, 795-810 (1943); 91 Cong. Rec. 10-14 (1945); 92 Cong. Rec. 7720-7728 (1946).

first emphasis was on 'Americanism' as the recognition of 'the existence of a God and the all-important fact that the rights of man are derived from God * * *.' The next report concentrated on groups which 'seek to change the policies and form of Government of the United States in accordance with the wishes of * * * foreign governments.' (Note, 47 Columbia Law Rev. 418).

"A later report said that the Committee's endeavor was 'to determine whether the persons under investigation have the interest of the United States Government at heart * * *.' Other criteria which the Committee or its agents have from time to time suggested as indicative of activity within the scope of its inquiries are: opposition to 'the American system of checks and balances,' opposition to the protection of property rights, belief in dictatorship, opposition to the Franco government of Spain, opposition to General MacArthur, advocacy of a world state, advocacy of the dissolution of the British Empire, criticism of members of Congress, and criticism of the Committee on Un-American Activities." (Id. pp. 422, 423).

Thus the Congress has authorized the Committee to require the disclosure on pain of criminal punishment, of opinions on such diverse matters as the existence of God, protection of property rights, the Franco government of Spain, General MacArthur, the British Empire, and of members of Congress. Free expression and exchange of ideas with respect to all of them is guaranteed by the First Amendment.

As we have said, compulsory revelation of opinion before the Committee, particularly where the opinions are unpopular, burdens the free expression of such opinions, and statutes restricting constitutionally protected speech, though invalid, exercise coercive powers by their appear-

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ance of authority. To the extent that the Resolution purports to authorize a compulsory revelation of political opinion having no relation to clear and present danger of substantive evils such as would warrant restrictions on their expression, it restrains and burdens the expression of such opinions outside the Committee room in violation of the First Amendment. Moreover, since the Resolution does not define the investigation in terms of expressed powers of Congress, and since the witness may refuse to answer if the matter is not pertinent to an inquiry Congress may lawfully authorize in aid of one or another of its legislative powers, *Kilbourn* v. *Thompson*, 103 U. S. 168, the witness is put to the task of determining, whether the evidence demanded is pertinent to any possible exercise of Congressional power. The witness is thus required to assume the burden of mental review of all of those powers, and to assume the risk of contempt, if the evidence demanded is, in one sense or other, pertinent to any one of them. Because this is so, the witness, rather than risk prosecution may disclose information which the Committee has no right to exact. Since such compulsory disclosure is threatened by the Resolution itself, the Resolution in this way, too, operates to burden speech. For as we have said, the dissenter who may be called to account before a hostile audience may prefer silence altogether. A nation which relies in its search for truth upon the free circulation of ideas cannot afford to put the price of dissent so high.

POINT II

The First Amendment is violated because the resolution provides improper standards.

A. The terms of reference are too vague.

At the outset the terms of reference under which the Committee has been directed to operate are so vague as to authorize any action which prejudice may inspire. What is "Un-American" and "subversive" is so debatable that no fixed meaning can be ascribed to those words. We do not think we need to quote the multitude of articles appearing in many magazines and law journals which give color to our views. Certainly from the variety of investigations undertaken by the Committee as noted on page , *supra,* it is quite clear that Congress itself could fix no area for such variable terms.

We also call the Court's attention to a recent article which points up the dangers inherent in governmental activity in the field of opinion and association where the terms of reference are vague and indefinite. Emerson and Helfeld, "Loyalty Among Government Employees", 58 Yale Law Journal, 1.

B. The mandate authorizes investigations on matters beyond the powers of Congress to investigate.

The resolution of the very basic problem posed by this case will depend on an accommodation of conflicting societal interests, both very real and very pressing. We assert, on the one hand, "the right to be let alone—the most comprehensive of rights and the right most valued by civilized

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men." (Brandeis, J. dissenting, *Olmstead* v. *United States*, 277 U. S. 438, 478). The Government will assert the importance of the right of Congress freely to ascertain any and all facts relevant to its legislative function. Both sides may concede the importance of the right asserted by the other, but both will deny it countervailing weight. We have asserted that if there is conflict between the two, the rights of the individual must prevail within the area of opinion. Beyond this, we believe that a determination in this case that the Constitution does not permit petitioner's conviction to stand will safeguard the constitutional rights of individuals without impairing in any significant respect the legitimate power of Congress to educate itself to the nation's needs.

We may assume arguendo that the right of silence differs in some degree from the right to speak as guaranteed by the First Amendment, and that the restraint imposed on speech by compelling speech may be justified as an incident of the inquisitional power when the information sought is desired in connection with a legitimate Congressional inquiry. But if this Court should so hold, it could do so only after striking a balance of competing considerations—the legislature's need for information on the one side, and the interest in having speech free from restraint, direct, or indirect, on the other. We submit that in making that judgment in this case, the failure of the Resolution to limit the scope of the inquiry to such matters as might be relevant to Congress' power to legislate requires the balance to be struck in favor of freedom, and not in favor of authority. We maintain, in other words, that if the justification for burdening speech is to be found in Congress' power to inquire in aid of legislation, then that justification

fails where not even minimum precautions have been taken to insure that the inquiry is indeed conducted for that purpose.

The Resolution carves out an area of human activity—and specifically the area of speaking, writing, and public assembly on political issues—and launches a general investigation in that area. The area is one in which Congress' competence to legislate is highly limited, and in which the opportunities and temptations for inquisitorial abuses are many (as the Committee's history shows). The Resolution does not direct the investigators to assemble such facts as might be relevant to some or any legislative power. It does not direct the Committee to determine whether there exists a political movement for violent overthrow of the Government, or whether the morale in the armed forces is being undermined. On the contrary, the Resolution, in terms and effect, authorizes an investigation into a large segment of American life without any attempt to limit the investigators to paths of inquiry consistent with the limited powers of Congress in the area under scrutiny.

It will be said that we must presume that the House authorized the inquiry for the purpose of collecting information it desired in aid of its legislative function. We may assume this to have been the purpose without conceding that the Resolution as drafted limits the Committee to the effectuation of that purpose. Need we presume also that the Committee, in execution of its authority under the Resolution, limits its investigation to the discovery of such information as might be helpful in legislation? We think not, not merely because that would be contrary to fact, but rather because the Resolution directs the Committee to undertake a general investigation without imposing any such limitation.

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It may be argued that Resolution is not too broad, and that the House could have determined that any and all information within the scope of the investigation authorized would or might be relevant to some one of its powers to legislate. We have already indicated that we do not believe this to be so, but making allowance for possible error, we will concede this point too for the moment. But in that view, hardly any aspect of life within the United States, however private, would be without some bearing, however slight, on some power of Congress. It may well be, therefore, that there is nothing so sacred or so private as to be beyond Congress' power to inquire. The difficulty here would then lie not in any lack of relevance in the subject-matter of the inquiry to some possible exercise of legislative power, but in the failure to provide standards which would provide some measure of insurance that the inquiry into that subject matter is being conducted for a legitimate purpose.

No Congressional investigation can or will ever discover and catalogue all of the minutiae of American life. Congressional investigations are, or should be, the work of practical men, seeking solution to practical problems, not adventures in curiosity into the merely interesting or remotely relevant. Investigation is necessarily a selective process, and selection necessarily implies criteria. The general course which the investigators will take, even the specific questions they address to witnesses, will be determined in large part by the standards of selection provided. If those standards are not rooted in some more or less specific power to legislate, especially where that power is highly limited in the area of the investigation, and that area is as broad as in this case, the investigators must needs proceed along the lines indicated by their commissions, without reference to the deficiencies of power. And

that, we may remark, is precisely what this Committee has done.

We have already stated that the Committee, in requiring witnesses to profess their political affiliations and beliefs, burdens the free expression of political ideas. If the First Amendment permits this when the burden is a practical concomitant of the legislative process, we do not believe that it does so when no such relationship exists. And, we submit, inasmuch as the Resolution does not direct the investigation to proceed in terms of the limited competence of Congress in the area of investigation, no constitutional justification exists for the burden imposed on the rights of free speech, press and public assembly.

POINT III

Section 192, as applied, violates the Fifth Amendment.

The statute petitioners were convicted of violating makes it a crime to refuse to produce evidence before a Congressional Committee "upon any matter pertinent to the inquiry." The matter under inquiry before the Committee was defined only by the Resolution. We submit that the vagueness of the language used in the Resolution to define the scope of the inquiry make it next to impossible for the witness to determine whether matter demanded is or is not pertinent to the inquiry. To the extent that Section 192 incorporates the terms of the Resolution, as it must, it provides no reasonably ascertainable standard of guilt, and conviction thereunder constitutes a violation of the due process clause of the Fifth Amendment. *Musser* v. *Utah*, 333 U. S. 95; *Winters* v. *New York*, 333 U. S. 507.

In addition to the problem of determining whether particular matter is pertinent to the inquiry as defined by the

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Resolution, the witness, from the Government's point of view, has the additional task, already remarked upon, of determining whether the matter demanded is pertinent to *any* inquiry Congress might constitutionally authorize. The witness may lawfully refuse to answer if the matter is not pertinent to an inquiry Congress may lawfully authorize in aid of one or another of its legislative powers, *Kilbourn* v. *Thompson*, 103 U. S. 168. In making his decision to answer or to refuse to do so from this viewpoint, the witness finds no help in the Resolution, which refers him to no specific power in Congress as the basis for the investigation. Evidence within the scope of the investigation as defined by the Resolution may or may not be pertinent as regards any or all of those powers, but the witness is made liable to fine and imprisonment if his mental search fails to detect the pertinency of the matter demanded of him to one of any number of undisclosed powers of Congress. In this respect too, Section 192, as applied, does not provide standards of guilt sufficient to satisfy due process.

CONCLUSION

We respectfully urge that this Court declare unconstitutional the mandate of the House Un-American Activities Committee.

Respectfully submitted,

American Civil Liberties Union,
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